

**UNITED STATES DEPARTMENT OF COMMERCE****United States Patent and Trademark Office**

Address: COMMISSIONER OF PATENTS AND TRADEMARKS  
Washington, D.C. 20231

*SM*

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
10974477.024	11-22-2001	PLATLEY	10

JOHN J. DAIGEL  
FISH & RICHARDSON, PC  
225 FRANKLIN STREET  
BOSTON MA 02110-2804

1M2270412

EXAMINER

FISH, J. H.

ART UNIT

PAPER NUMBER

10

1761

**DATE MAILED:**

04/12/01

**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**

<b>Offic Action Summary</b>	Application No.	Applicant(s)
	09/447,023	Martin F. Berry
	Examiner	Art Unit
	Helen F. Pratt	1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 14 March 2001.

2a) This action is **FINAL**.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 70, 89-110 (70, 85-100) is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 89-110 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. § 119**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

**Attachment(s)**

15)  Notice of References Cited (PTO-892)      18)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_

16)  Notice of Draftsperson's Patent Drawing Review (PTO-948)      19)  Notice of Informal Patent Application (PTO-152)

17)  Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_      20)  Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Objections*

The numbering of claims is not in accordance with 37 CFR 1.126 which requires the original numbering of the claims to be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When new claims are presented, they must be numbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claims have been renumbered 85-100.

In addition, non-elected claims 1-65 have not been canceled.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 70, 85-106 are rejected under 35 U.S.C. 103(a) as being unpatentable over Confectionery Production (abstract CP) in view of Ashurst et al. and Muranishi et al. (JP 10042824 A- , the AF reference on Applicant's IDS).

The claims are rejected for the reasons of record cited in the last office action.

Claim 70 has been amended to require a blended juice with an anthocyanin content of a particular level and other known beverage components such as water, and sweetener. However, Muranishi et al. disclose an agent which can be added to beverages or made into a beverage which is made of a concentrated cranberry juice which has been decolored using a porous resin which can be added in amounts of from 0.005-0.15% to

foods. The juice contains various organic acids, and it is well known to use water and sweeteners to make a beverage. The abstract does not say what the anthocyanin level is but claims 70 and 85(89), and 86(90) state that the anthocyanin levels are from 3.5 to 10 mg/100 ml or less. Certainly, a decolored juice reads on "or less". Therefore, it would have been obvious to use a decolored juice to make a blended beverage because the reference discloses that it is added in various amounts to foods which can be beverages.

Claims 87(91) and 98(102) further require that the juice component is the sole juice component in composition. The reference does disclose a small amount of the decolored juice to be used to make a beverage. However, it is a concentrated product. No patentable distinction is seen in adding a concentrated product to a beverage to make a diluted product and in adding a juice component which is not concentrated. Therefore, it would have been obvious to use whatever amount of the juice component was required to make a beverage keeping in mind the concentration of the juice component.

The particular amount as in claim 103(107) is seen to have been within the skill of the ordinary worker to add enough juice component to make a particular product. Nothing new or unobvious is seen in the use of the particular light absorbance as in claim 104 (108) and nothing is seen at this time that it is not the color of the reference. Also, it is seen that it would have been within the skill of the ordinary worker to make a product of a particular color using the cited treatments of the reference. Therefore, it

would have been obvious to add particular amounts of juice to a product in order for the product to have particular characteristics and to achieve a particular light absorbance.

The further limitations as to the use of sucrose, acid, and water as in claims 99, 100, 101, 102 (103-106) and the further claims are well known and obvious ingredients in making beverages.

#### ARGUMENTS

Applicant's arguments with respect to claims 85-100 (89-110) have been considered but are moot in view of the new ground(s) of rejection.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Application/Control Number: 09/447,023  
Art Unit: 1761

Page 5

Any inquiry concerning this communication should be directed to Helen F. Pratt  
at telephone number 703-308-1978.

Hp 4-11-01

*H. Pratt*  
HELEN PRATT  
PRIMARY EXAMINER